A **ALLIANCE INVESTMENT BANK SDN BHD**

v.

GOOD QUANTUM SDN BHD & ORS

B HIGH COURT MALAYA, KUALA LUMPUR
HASNAH MOHAMMED HASHIM JC
[SUIT NO: D-22-15-2009]
19 JULY 2010

C ***CIVIL PROCEDURE:*** *Striking out - Application to strike out action - Whether plaintiff had locus standi to bring action pursuant to a vesting order - Whether vesting order null and void for non-compliance with s. 49(7) Banking and Financial Institutions Act 1989 and s. 124B Securities Commission Act 1993 - Whether plaintiff's claim had a*
D *sustainable cause of action*

CIVIL PROCEDURE: *Judgments and orders - Vesting order - Whether vesting order null and void - Whether plaintiff required to obtain approval from the Minister of Finance before applying for the vesting order - Whether letter issued by Bank Negara Malaysia and Securities*
E *Commission sufficient to show approval from Minister of Finance*

BANKING: *Banks and banking business - Vesting order, validity of - Whether bank could bring action for breach of agreement pursuant to vesting order - Banking and Financial Institutions Act 1989, s. 49(7) -*
F *Securities Commission Act 1993, s. 124B*

The Kuala Lumpur City Securities ('KLCS') entered into a Margin Trading Facility Agreement ('MTF') with Dunia Dimensi Sdn. Bhd. The 1st defendant agreed to assume all the liabilities and
G obligations of Dunia Dimensi under the MTF and the 2nd, 3rd and 4th defendants provided the guarantee. KLCS then entered into a Business Transfer Agreement ('BTA') with the plaintiff, a licensed financial institution pursuant to s. 6 Banking and Financial Institutions Act 1989 ('BAFIA'). A vesting order was granted to
H transfer all the rights, assets and obligations of KLCS to the plaintiff. Subsequently, when there was a breach of the MTF, the plaintiff brought an action against the defendants for monies due and owing.

I The 1st defendant's contention was that the plaintiff did not have the *locus standi* to bring the action as the vesting order was null and void. The 1st defendant argued *inter alia* that (i) the plaintiff

did not obtain the approval from the Minister of Finance ('Minister') pursuant to s. 49(1)(B) of BAFIA and s. 124B(1)(a) Securities Commission Act 1993 ('SCA') before applying for the vesting order and; (ii) that the letter jointly issued by Bank Negara Malaysia ('BNM') and the Securities Commission did not satisfy the statutory requirements under BAFIA and SCA and it could not be considered an approval letter from the Minister.

Held (dismissing the defendant's application)

(1) KLCS was not a licensed financial institution within the definition of BAFIA; instead it was a licensed dealer under the provision of s. 12 Securities Industry Act 1983. This meant that the provision of s. 49 BAFIA which required the plaintiff to get the approval of the Minister before applying for the vesting order was not applicable. (para 20)

(2) The provisions under s. 49(7) BAFIA and s. 124B SCA do not specify how the notice of approval should be given *ie*, whether by a letter from the Minister himself or through notification by someone else. If a specific mode was required it would be expressly stated. Therefore, the letter jointly issued by BNM and the Securities Commission was sufficient notice of the Minister's approval and in compliance with s. 124B SCA and s. 49(7) BAFIA. (paras 21-25)

(3) A vesting order can only be proved null and void on the ground of illegality or lack of jurisdiction. In this instance, the vesting order was valid and the plaintiff had *locus standi* to initiate the action against the defendants by virtue of the vesting order. (paras 26 & 27)

(4) The court will only dismiss an action where it was a plain and obvious case for striking out. The 1st defendant had failed to show that the plaintiff's claim did not have a sustainable cause of action. There was also no finding that the plaintiff's claim was frivolous, vexatious or an abuse of process of court. (paras 28-31)

Case(s) referred to:

Aberfoyle Plantations Ltd v. Khaw Bian Cheng [1959] 1 LNS 3 PC ***(refd)***

AG of Duchy of Lancaster v. L & NW Railway Co [1892] 3 Ch 274 ***(refd)***

Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC ***(refd)***

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

A *Golden Century Development Sdn Bhd & Anor v. Gan Hoe & Anor [1982] CLJ 536; [1982] CLJ (Rep) 106 FC* ***(refd)***
Ideal City Development Sdn Bhd v. Dynamic Mould Sdn Bhd [2003] 3 CLJ 201 CA ***(refd)***
Lee Nyan Choi v. Voon Noon [1978] 1 LNS 94 FC ***(refd)***
B *National Land Finance Co-operative Society Ltd v. Sharidal Sdn Bhd [1983] 2 CLJ 76; [1983] CLJ (Rep) 282 FC* ***(refd)***
Phileo Allied Bank (M) Bhd v. Khoshish Credit & Leasing Sdn Bhd [2002] 1 MLJ 245 ***(refd)***
Re Southern Investment Bank Bhd & Anor; Applicants [2009] 8 CLJ 60 HC ***(refd)***
C *Roslan Abdullah v. New Zealand Insurance Co Ltd [1981] 1 LNS 40 FC* ***(refd)***
Standard Chartered Bank Malaysia Bhd v. Eden Enterprises (M) Bhd [2003] 2 CLJ 671 HC ***(refd)***

Legislation referred to:
D Banking and Financial Institutions Act 1989, ss. 6(4), 49(1)(B), (7), (8), (9)(b), 50(3)
Delegation of Powers Act 1956, s. 17
National Land Code, s. 420
Rules of the High Court 1980, O. 18 r. 19(1)(b), (d)
E Securities Commission Act 1993, ss. 12, 124A, 124B(1)(a)
Securities Industry Act 1983, s. 12

For the plaintiff - Nad Segaram; M/s Shearn Delamore & Co
For the defendant - Mr Lau; M/s Sreenevasan Young

F *Reported by Melinda Robert*

JUDGMENT

G **Hasnah Mohammed Hashim JC:**

[1] This an application *vide* a summons in chambers in encl. 18 by the 1st defendants/applicant under O. 18 r. 19(1)(b) and (d) of the Rules of the High Court 1980 for the following orders:

H 1) that the writ of summons and statement of claim dated 5 January 2009 be struck out on the grounds that:

(i) it is scandalous, frivolous or vexatious; and/or

(ii) it is otherwise an abuse of the process of the court.

I

2) that the plaintiff's writ of summons and statement of claim dated 5 January 2009 be set aside and the plaintiff's action as against the 1st defendant be dismissed; and

3) the cost of and incidental to this action and application be taxed on the indemnity basis and paid by the plaintiff to the 1st defendant.

[2] The application is supported by affidavit affirmed on 16 November 2009.

Brief Facts

[3] The Kuala Lumpur City Securities (KLCS) had granted a Margin Trading Facility to Dunia Dimensi Sdn. Bhd ('Dunia Dimensi'). A Margin Trading Facility Agreement dated 24 March 2004 was executed between the parties. The limit of the Facility was RM6 million. KLCS advanced the RM6 million to Dunia Dimensi. By a Novation Agreement dated 23 June 2006 the 1st defendant agreed to assume all the obligations and liabilities of Dunia Dimensi under the Margin Trading Facility Agreement. The 2nd, 3rd and 4th defendants provided the guarantee.

[4] The plaintiff and KLCS entered into a Business Transfer Agreement on 4 October 2006 whereby KLCS transfer all of its business, assets and liabilities to the plaintiff. The plaintiff was licensed to carry on merchant banking business and was a licensed financial institution under s. 6 of the Banking and Financial Institutions Act 1989 (BAFIA). The KLCS was a licensed dealer pursuant to s. 12 of the Securities Commission Act 1993 (SCA). An application to the High Court under s. 124B SCA was made to merge Alliance Bank and the KLCS.

[5] A vesting order was granted by the court on 28 December 2006 giving effect to the transfer and/or merger of the plaintiff and KLCS. By virtue of the vesting order all the rights, assets and obligations of KLCS was transferred to the plaintiff.

[6] Subsequently there was a breach of the facility agreement and despite demands made by the plaintiff the defendants failed and/or refused to pay the amount that is said to be owing to the plaintiff. The plaintiff then initiated this action against the defendants for the following:

a) the sum of RM4,174,976.15 due and owing as at 3 October 2008;

A b) interest at the rate of 8% pa calculated on daily rests commencing from 4 October 2008; and

c) cost.

B **First Defendant's Grounds For Striking Out**

[7] The plaintiff does not have *locus standi* to bring this action against the defendants as the vesting order is null and void for the following reasons:

C a) the plaintiff and the KLCS were required to obtain the Minister of Finance's ('Minister') approval pursuant to s. 49(1)(B) of the Banking and Financial Institution Act 1989 and s. 124B(1)(a) of the Securities Commission Act 1993 before applying for the Vesting Order;

D b) the vesting order was not premised on s. 50 of BAFIA; and

c) pursuant to s. 49(9)(b) of BAFIA, the Bank Negara Malaysia "shall not" recommend for approval and the Minister shall not approve a merger with a non-licensed institution.

E **[8]** It is the submission of the 1st defendant that the Business Transfer Agreement remains ineffective as the condition precedent has not been fulfilled as the Minister of Finance's approval within the meaning of ss. 124B(1)(a)(A) or (B) of SCA and s. 49(7) of F BAFIA has not been obtained. The only document that was shown to the court is a letter issued by the Bank Negara Malaysia and the Securities Commission dated 30 June 2006 (BNM Letter). The 1st defendant contends that the BNM Letter does not satisfy the statutory requirements under the SCA and/or G BAFIA as the purported approval does not state clearly that the approval is given upon considering the recommendations of the SC and BNM. Furthermore it is submitted that the BNM Letter cannot be considered as an approval letter signed by the Minister of Finance himself or by an authorized officer on behalf of the H Minister of Finance pursuant to s. 17 of the Delegation of Powers Act 1956.

[9] The 1st defendant cited as authority the case of *Re Southern Investment Bank Bhd & Anor; Applicants* [2009] 8 CLJ 60. In that I case it was an application pursuant to s. 50 of BAFIA for an order to transfer and vest the assets and liabilities of the first

applicant to the second applicant. The applicants had shown to the court the letter issued by Bank Negara and the Securities Commission. His Lordship Mohd Hishamudin J held that:

> It was essential for the applicants to exhibit either an approval letter signed by the Minister of Finance himself, or an approval letter signed by an authorized officer on behalf of the Minister of Finance pursuant to s. 17 of Delegation of Powers Act 1956. Further, since the Minister's approval was given pursuant to s. 49(7) of BAFIA, the approval letter must clearly state that the approval was given pursuant to an application by the applicants and upon considering the recommendation of Bank Negara. There was no suggestion by the applicants herein that the two officers/ signatories, when they jointly signed the letter, were acting pursuant to s. 17 of the Delegation of Powers Act 1956.

[10] It is the submission of the 1st defendant that the failure to procure such an approval results in the Agreement being void and as a consequence the Vesting Order is null and void. The cases of *National Land Finance Co-operative Society Ltd. v. Sharidal Sdn. Bhd.* [1983] 2 CLJ 76; [1983] CLJ (Rep) 282; *Ideal City Development Sdn. Bhd. v. Dynamic Mould Sdn. Bhd.* [2003] 3 CLJ 201; *Aberfoyle Plantations Ltd. v. Khaw Bian Cheng* [1959] 1 LNS 3 was referred to by the learned counsel of the 1st defendant.

[11] The second point that was raised by the 1st defendant is that the Business Transfer Agreement is premised upon the BNM Letter which is contrary to s. 49(9)(b) of BAFIA which provides that the BNM "... shall not ..." recommend for approval and the Minister "... shall not ..." approve a merger with a non-licensed institution.

The Plaintiff's Arguments

[12] The KLCS is not a licensed financial institution within the definition of BAFIA and therefore the Vesting Order application could not be under the aforesaid Act therefore the issue of non-compliance to BAFIA does not arise. The KLCS was in fact a licensed dealer under s. 12 of the Securities Industry Act 1983 and was carrying on the business of a stock broking company.

[13] There are no requirements under the SCA that the approvals must satisfy the purported formal requirements. The application of the said Vesting Order was made under s. 124B of the SCA and not under BAFIA. Section 124B of SCA provides that where in the case of a licensed dealer the Minister has given

his approval for the transfer, amalgamation, merger of a licensed dealer than the entity whose business is to be transferred and the entity to whom the transfer is to be made may make a joint application to the High Court for an order to facilitate and give effect to the agreement.

[14] The learned counsel for the plaintiff further submits that the argument of the 1st defendant that such an application should have been made under s. 50 of BAFIA is untenable since the express words of s. 50 refers to applications for transfer of business from one licensed institution to another. Since KLCS is not a licensed institution as defined under BAFIA therefore s. 50 is not applicable. The correct provision would be pursuant to section 124B of the SCA. Section 124B SCA dealt with the application to the High Court to facilitate agreement or arrangement for transfer of the whole or part thereof the business of licensed persons. The definition of "licensed dealer" is defined under s. 124A SCA as "... a person licensed under subsection 12(1) of the Security Industry Act 1983 ...". Section 124B(1)(a) provides where in the case of:

> a licensed dealer or licensed futures broker, the Minister, on the recommendation of the Commission, has granted his approval; ...
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> ...
>
> ... the entity whose business is to be transferred ... and the entity to whom the transfer is made, ... may make a joint application to the High Court by way of *ex parte* originating summons for such order of the Court ... to facilitate or enable the agreement or arrangement being given effect to.

Section 124B(4) of SCA further provides that:

> Where the order of the High Court granted under sub-section (3) provides for the transfer ... and the order shall have effect according to its terms notwithstanding anything in any written law or any or any rule of law, and shall be binding on any person affected, regardless that the other person so affected is not a party to the proceedings ...

[15] The plaintiff's counsel cited the case of *Phileo Allied Bank (M) Bhd. v. Khoshish Credit & Leasing Sdn. Bhd.* [2002] 1 MLJ 245 where it was held that s. 50 of BAFIA expressly provide that the Vesting Order shall have effect according to its terms notwithstanding in any law or in any rule of law. Therefore since

s. 420 of the National Land Code was already in existence at the time s. 50(3) of BAFIA was enacted, the intention of Parliament was that the words "... shall have effect accordingly to its terms notwithstanding anything in any law or in any rule of law ..." under s. 50(3) of the BAFIA must mean that the vesting order shall take effect.

[16] The plaintiff also cited the case of *Standard Chartered Bank Malaysia Bhd. v. Eden Enterprises (M) Bhd* [2003] 2 CLJ 671 where the defendant in that case had raised an objection in the summary judgment proceedings to the validity of the vesting order. The High Court held that the court had no business to look into the validity of the vesting order which was an order that has been made and duly perfected.

[17] Therefore any order of the court has force of law until it has been set aside. Since the 1st defendant has not file any application to set aside that order, the plaintiff submits that the Vesting Order is valid as they have taken the appropriate action as required under the SCA.

Findings And Decision

Locus Standi

[18] The 1st defendant had submitted that the Vesting Order is null and void as the provisions of s. 49(1)(B) BAFIA and s. 124B(1)(a) of the SCA were not complied with. The plaintiff on the other hand submitted that since the KLCS is a not a licensed financial institution within the definition of BAFIA therefore the Vesting Order application could not be under the aforesaid Act. The Vesting Order was made pursuant to s. 124B(1)(a) of the SCA.

[19] It would be pertinent to look at the relevant provisions under BAFIA and SCA.

Section 49(1) BAFIA reads as follows:

> No person shall enter into an agreement or arrangement:
>
> (a) which will result in a change in the control of a licensed institution or its holding company;
>
> (b) for the sale, disposal, or transfer howsoever, of the whole or any part of the business of a licensed institution;

A (c) for the amalgamation or merger of a licensed institution with any other person;

or

(d) for the reconstruction of a licensed institution, unless:

B (A) the proposed agreement or arrangement is in writing; and

(B) all the parties thereto have first made an application in writing to the Minister for his approval of such agreement or arrangement and have obtained the C Minister's approval thereto.

Section 49(7) BAFIA provides as follows:

Upon receiving an application and the recommendation of the Bank under this section, the Minister may approve the application D with or without any modifications, variations or conditions, or refuse the application.

[20] The KLCS was not a licensed financial institution within the definition BAFIA. A "licensed institution" is defined under BAFIA E as "... any institution licensed or deemed to be licensed under subsection 6(4) ..." The KLCS was a licensed dealer under s. 12 of the Securities Industry Act 1983. The application for the Vesting Order was made pursuant to s. 124B of the SCA. Therefore the requirement under s. 49 BAFIA is not applicable to F the KLCS as it was not a licensed institution under BAFIA.

[21] The letter issued by BNM and Securities Commission dated 30 June 2006 which was exhibited when the application for Vesting Order was made is sufficient to show that the Minister of Finance had on 28 June 2006, after having considered the G recommendations made by Bank Negara, given his approval for the transfer of assets and liabilities of the KLCS to Alliance Merchant Bank Berhad which later became Alliance Investment Bank Berhad. It is stated in the said letter as follows:

H Kami ingin dimaklumkan bahawa Y.B Menteri Kewangan, pada 28 Jun 2006 telah memberi kelulusan menurut seksyen 49(7) Akta Bank dan Institusi Kewangan 1989 (ABIK) dan seksyen 124B Akta Suruhanjaya Sekuriti 1993 bagi Alliance Merchant dan Kuala Lumpur City Securities Sdn. Bhd. (KLC Securities) membuat perkiraan atau perjanjian yang akan mengakibatkan pelupusan aset I dan liabiliti KLC Securities kepada Alliance Merchant tertakluk kepada syarat-syarat seperti di Lampiran 1 ...

[22] The letter was jointly signed by the Deputy Governor of Bank Negara Malaysia and the Director of the Securities Commission. The Minister of Finance had given his approval under s. 49(7) BAFIA and s. 124B SCA. A

[23] In *Re Southern Investment Bank Bhd & Anor; Applicants* [2009] 8 CLJ 60 Justice Hishamudin Yunus J had stated that there must be either an approval letter signed by the Minister of Finance himself, or an approval letter signed by an authorized officer on behalf of the Minister of Finance pursuant to s. 17 of Delegation of Powers Act 1956. His Lordship further said in his judgment that since the Minister's approval was given pursuant to s. 49(7) of BAFIA, the approval letter must clearly state that the approval was given pursuant to an application by the applicants and upon considering the recommendation of Bank Negara. B C

[24] However, the provisions under s. 49(7) BAFIA and s. 124B SCA does not specify the mode the notice of the approval of the Minister of Finance should be given that is, whether there should be a letter from the Minister himself that he had considered the recommendations and granted the approval or his approval, if granted would be notified by someone other than the Minister of Finance to the applicants. If however the Minister refuse an application it is expressly provided under s. 49(8) BAFIA that the Central Bank (Bank Negara) is required to notify in writing of the refusal: D E F

> (8) Where the Minister refuses an application, the Bank shall notify the applicants in writing of the refusal.

[25] If it was intended that there should be a letter signed by the Minister himself or an approval letter signed by an authorized officer on behalf of the Minister of Finance pursuant to s. 17 of Delegation of Powers Act 1956 then it would have been expressly provided under the law making it mandatory similar to s. 49(8) BAFIA. Therefore since there is no express provision the letter issued jointly by Bank Negara and the Securities Commission notifying the approval of the Minister is sufficient and in compliance with s. 124B SCA and s. 49(7) BAFIA. G H

[26] The Vesting Order granted by the High Court is valid and has been perfected. There is no issue of illegality or lack of jurisdiction. Mohd Azmi FCJ in *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75 said that: I

A It is settled law that one High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction. The one special exception to this rule is where the final judgment of the High Court can be proved to be null and void on the ground of illegality or lack of jurisdiction. Apart from the breach of natural justice, in any attempt to widen the door of the inherent and discretionary jurisdiction of the superior courts to set aside an order of court *ex debito justitiae* to a category of cases involving orders which contravened any written law, the contravention should be one which defies a substantive statutory prohibition so as to render the defective order null and void on the ground of illegality or lack of jurisdiction. The discretion to invoke the inherent jurisdiction should also be exercised judicially in exceptional cases, where the defect is of such a serious nature that there is a real need to set aside the defective order to enable the court to do justice.

[27] Therefore by virtue of the Vesting Order granted by the High Court on 28 December 2006 the plaintiff has *locus standi* to initiate this action against the 1st defendant.

[28] It is only in plain and obvious cases that the court will dismiss an action summarily. In the case of *Lee Nyan Choi v. Voon Noon* [1978] 1 LNS 94; [1979] 2 MLJ 28 Lee Hun Hoe CJ (Borneo) at p. 29 observed that:

> The power to dismiss an action summarily without permitting a party to trial is a drastic power and should be exercised with utmost caution. The power of summary procedure should only be resorted to on plain and obvious cases.

[29] The Federal Court in *Roslan bin Abdullah v. New Zealand Insurance Co. Ltd.* [1981] 1 LNS 40 and in *Golden Century Development Sdn Bhd & Anor v. Gan Hoe & Anor* [1982] CLJ 536; [1982] CLJ (Rep) 106 referred to the English case, *AG of Duchy of Lancaster v. L & NW Railway Co.* [1892] 3 Ch 274 and observed that summary procedure:

> … can only be adopted when it can clearly be seen that a claim or answer is on the face of it 'obviously unsustainable' …

[30] The principle relating to O. 18 r. 19(1) RHC was considered in *Bandar Builder Sdn. Bhd. & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7. Mohamad Dzaiddin SCJ (as he then was) said at p. 11 that:

> It is only in plain and obvious cases that recourse should be had to summary process under this rule (per Lindley MR in *Hubbuck & Sons ltd v. Wilkinson, Heywood & Clark Ltd.*) and this summary procedure can only be adopted when it can be clearly seen that a claim or answer can only be adopted when it can be clearly seen that a claim or answer is on the face of it 'obviously unsustainable'.

His Lordship goes on to say that such process:

> … cannot be exercised by a minute examination of the documents and facts of the case, in order to see whether the party has a cause of action or a defence … The court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable.

[31] Having considered the pleadings it could not be said that this was a plain and obvious case for striking out the writ of summons and statement of claim. The 1st defendant has fail to demonstrate that the plaintiff does not have a sustainable cause of action. I am also of the view that it is neither frivolous nor vexatious or an abuse of the process of court.

[32] For the reasons stated above I dismiss the application of the 1st defendant to strike out the writ of summons and statement of claim dated 5 January 2009 with cost.